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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Amendment of Section 73.202(b),) MM Docket No. 96-253
Table of Allotments,) RM-8962
FM Broadcast Stations)
(Bainbridge, Georgia))

To: Chief, Mass Media Bureau

PETITION FOR RECONSIDERATION

Paxson Communications Corporation ("Paxson"), licensee of Radio Station WXSX(FM), Quincy, Florida, by its attorneys, and pursuant to Section 1.429(a) of the Commission's Rules, hereby submits its *Petition for Reconsideration* of the *Report and Order* of the Mass Media Bureau's Allocations Branch (the "Staff") in the above-captioned proceeding.^{1/}

I. Introduction

In allotting Channel 270A to Bainbridge, Georgia, the Staff failed to follow the Commission's policy for resolving conflicts between a rulemaking proposal and a subsequently filed minor change application. Commission policy requires the Staff to attempt to resolve such conflicts through non-prejudicial channel or site substitutions. If substitutions will not solve the

^{1/} See *Bainbridge, Georgia*, DA No. 97-1888, MM Docket No. 96-253 (rel. Sept. 5, 1997) ("*Bainbridge Order*"). Section 1.429(d) of the Commission's rules requires parties to file petitions for reconsideration "within 30 days from the date of the public notice" of the adverse decision. 47 C.F.R. §§ 1.4(b), 1.429(d) (1996). Public notice of the *Bainbridge Order* was released in the Federal Register on September 11, 1997. Accordingly, parties must file petitions for reconsideration by October 14, 1997. Thus, this Petition is timely filed.

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conflict, then the Staff may weigh the public-interest benefits of each proposal and select the one that best serves the public interest.

In this case, the Staff disregarded Commission policy and improperly dismissed a proposal for resolving the conflict in this proceeding. It considered each applicant's public-interest showing before attempting to accommodate them both through non-prejudicial channel substitutions. The Staff also improperly dismissed as untimely a proposal that would resolve this conflict. Good cause existed for accepting the proposal because the alternate channels proposed did not become available until after the comment period closed. Accordingly, the Staff must reconsider its *Bainbridge Order*.

II. Factual and Procedural History

In 1995, Great South Broadcasting, Inc. ("Great South"), the prior owner of WXSR(FM), Channel 268C2, Quincy, Florida, petitioned to upgrade WXSR(FM) to Class C1 status. The Staff granted Great South's petition in a *Report and Order* released August 2, 1996, but at a different transmitter site than WXSR(FM)'s current site. *See Apalachicola, Florida, Report and Order*, 11 FCC Rcd 8772, 8775 (rel. Aug. 2, 1996) ("*1996 Order*"). On September 13, 1996, Paxson consummated its purchase of WXSR(FM) from Great South.

On November 22, 1996, Chattahoochee Broadcast Associates ("CBA") filed a petition for rulemaking requesting the allotment of Channel 270A to Bainbridge, Georgia. The Staff issued a Notice of Proposed Rule Making in response on December 20, 1996. *See Bainbridge, Georgia, Notice of Proposed Rulemaking*, 11 FCC Rcd 20904 (1996). On December 30, 1996, Paxson filed an application for a construction permit to upgrade the facilities of WXSR(FM) to Class C1 status at the station's current transmitter site in Quincy. *See Minor Change Application*

for Construction Permit, BPH-961230IA (Dec. 30, 1996). Paxson subsequently learned that the existing site in Quincy, however, is short-spaced to the proposed allotment of Channel 270A to Bainbridge.

Following the close of the comment period in this proceeding, and based upon the Staff's decision in a separate allotment proceeding, Clyde Scott of EME Communications filed a petition to resolve the Paxson/CBA conflict. See Clyde Scott, Jr. d/b/a EME Communications, *Proposed Rulemaking Conflict Solution*, MM Docket No. 96-253 (July 21, 1996). Mr. Scott proposed the following changes to the Table of Allotments: (1) the deletion of Channel 251A from Dawson, Georgia; (2) the addition of Channel 221A to Dawson, Georgia; and (3) the substitution of Channel 251A for Channel 270A at Bainbridge, Georgia. This alternate allotment scheme will permit both CBA and Paxson to operate at their requested locations and power without any site restrictions. The Staff, however, dismissed Mr. Scott's *Proposed Rulemaking Conflict Solution* as untimely and allotted Channel 270A to Bainbridge. The Staff did not attempt to resolve the conflict by using either Mr. Scott's proposal or an alternative allotment based upon a staff engineering analysis. Its decision rested solely on a comparison of the public-interest benefits of the CBA and Paxson proposals. The Staff's conclusion was in error and should be reconsidered.

**III. The Allocations Branch Violated the Commission's
Conflicts Order When it Refused to Attempt to
Allot Alternate Channels to Resolve the Conflict
Between CBA's Rulemaking Petition and the
WXS(FM) Application.**

Under Commission allotment policy, the Staff must attempt to resolve rulemaking conflicts through non-prejudicial channel or site substitutions whenever possible. The

Commission has directed the Mass Media Bureau to "attempt to resolve conflicts between a rulemaking petition and a later-filed FM application . . . by allotting an alternate channel for that proposed in the petition, whenever it is possible to do so without prejudice to a timely filed FM application or rulemaking petition." *Conflicts Between Applications and Petitions for Rulemaking to Amend the FM Table of Allotments* ("Conflicts Order"), Memorandum Opinion and Order, 8 FCC Rcd 4743, 4745 n.12 (1993); see also, e.g., *Pinewood, South Carolina*, 5 FCC Rcd 7609, 7611 n.5 (1990) (noting that "the staff, on its own initiative, typically investigates and implements channel substitutions to resolve allotment conflicts on a routine basis").^{2/} Only if the Staff cannot develop an alternate channel allotment that prejudices no party may it then weigh the public interest benefits of the two competing proposals and select one.^{3/}

The Staff departed from this policy when it failed to consider alternate allotments or sites that would accommodate the allotment of Channel 270A to Bainbridge and WXSX(FM)'s Class C1 upgrade. Its decision was based solely on an evaluation of the public interest benefits of the conflicting proposals without any consideration of an alternate channel allotment that would

^{2/} Numerous decisions rely on staff analysis to award allotments that no applicant has proposed. See, e.g., *Amelia, Louisiana*, DA No. 97-1997, MM Docket No. 97-8 (1997) (rejecting rulemaking allotment proposal after staff analysis failed "to find a fully spaced site that is not located in swampland"); *Carolina Beach, South Carolina*, 7 FCC Rcd 544, 548 n.13 (1992) (relying on a staff engineering analysis generated after the record had closed to solve a multiparty conflict by reallocating channels in a manner that no party had proposed).

^{3/} Alternative allotments that resolve mutually exclusive proposals may not be adopted if the allotment would prejudice a separate rulemaking or application proposal. See *Conflicts Between Applications and Petitions for Rulemaking to Amend the FM Table of Allotments*, Report and Order, 7 FCC Rcd 4917, 4920 n.20 (1992), modified on other grounds, *Conflicts Order*, 8 FCC Rcd 4743. In this case, however, no one has filed a separate rulemaking or application proposal to use the alternate channels that would resolve the CBA/Paxson dispute. Because an alternate channel arrangement would only affect the parties involved in this proceeding, nothing prevents the Staff from considering alternate allotments.

have permitted grant of *both* proposals. The Staff's procedural error proves particularly damaging where, as here, an alternate channel allotment plan was proposed that could accommodate both proposals. After the time period for filing comments but well before issuance of the Bainbridge order, the Staff decided a separate allotment proceeding for a number of communities near Bainbridge, Georgia that offered new opportunities to resolve the CBA/Paxson conflict. *See Cordele, Georgia*, DA No. 97-1428, MM Docket No. 93-270, 1997 FCC LEXIS 3629 (rel. July 11, 1997) ("*Cordele Order*"). Within twelve days of the *Cordele Order*, Clyde Scott of EME filed his Proposed Rulemaking Conflict Solution with the Commission to resolve the Paxson/CBA conflict. In his filing, Mr. Scott explained that the Staff's *Cordele Order* freed alternate channels that the Staff could use to resolve the conflict between Paxson's and CBA's proposals without prejudicing either party. *Id.* Although the timing of the *Cordele Order* prevented Mr. Scott from filing his proposal during the comment period, the Staff dismissed Mr. Scott's filing as untimely. *See Bainbridge, Georgia*, DA 97-1888, MM Docket No. 96-253 at 1 n.1.

The Staff erred when it refused to consider Mr. Scott's proposal. The Staff asserts that Mr. Scott's proposal was untimely, yet the alternate channel allotments proposed by Mr. Scott were not available during the comment period as the *Cordele Order* was not decided until several months later. Given these unique circumstances, good cause existed for accepting Mr. Scott's proposal late and considering it as a possible solution to the conflict between CBA's and Paxson's proposals.

IV. Conclusion

The Staff should reconsider its decision in this proceeding. Its refusal to consider any alternative means of accommodating both Paxson's and CBA's proposals contravened the FCC's *Conflicts Order*. Good cause existed for considering Mr. Scott's submission because although untimely, it proposed a solution to resolve the conflict that did not become available until after the close of the comment period in this proceeding.

Accordingly, Paxson urges the Staff to reconsider its decision and specifically to consider the alternate channel allotments proposed by Clyde Scott, Jr. which would resolve the conflict between WXSJ(FM)'s upgrade application and CBA's rulemaking petition.

Respectfully submitted,

PAXSON COMMUNICATIONS CORPORATION

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October 14, 1997

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing "Petition for Reconsideration" was sent on this 14th day of October, 1997, via first-class United States mail, postage pre-paid, to the following:

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A handwritten signature in cursive script, reading "Lisa Saunders", written in black ink. The signature is positioned above a horizontal line.

Lisa Saunders